STATE OF MICHIGAN

COURT OF APPEALS

JERICO CONSTRUCTION, INC.,

Plaintiff-Counterdefendant-Appellant

v

QUADRANT, INC.,

Defendant-Counterplaintiff-Appellee,

and

D & R COMPANY, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
March 26, 1999

No. 206026
Oakland Circuit Court
LC No. 95-510679 NZ

Before: Markman, P.J., and Jansen and J.B. Sullivan*, JJ.

MARKMAN, P.J. (dissenting).

I respectfully dissent. I do not agree that the trial court erred in denying plaintiff's motion to amend its complaint a second time or in granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(8).

This Court has discussed the test for determining whether a plaintiff has alleged a claim of tortious interference: "[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act, or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 777-81; 421 NW2d 289 (1988), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). Such plaintiff must demonstrate, with specificity, affirmative acts by the interferor which corroborate the unlawful purpose of the interference. *Feldman*, *supra* at 369-70. Therefore, in addition to being intentional, the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

interference must be "improper", i.e., illegal, unethical, or fraudulent. *Weitting v McFeeters*, 104 Mich App 188, 197-98; 304 NW2d 525 (1981). According to the Standard Jury Instructions:

> "Improper" is defined as "conduct that is fraudulent, not lawful, not ethical, or not justified under any circumstances. If defendant's conduct was lawful, it is still improper if it was done without justification and for the purpose of interfering with plaintiff's business relationship or expectancy, but plaintiff must specifically show affirmative acts by defendant that corroborate that defendant had the wrongful purpose of interfering with plaintiff's business relationship or expectancy." [SJI2d 126.04]

A "per se wrongful act" is an act that is inherently wrongful or an act that can never be justified under any circumstances. *Patillo v Equitable Life Assurance*, 199 Mich App 450; 502 NW2d 696 (1993).

Where defendants are motivated by legitimate personal and business reasons, they are shielded from liability against this cause of action. *Formall, supra* at 780; *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330, 348; 401 NW2d 641 (1986). Actions that are motivated by legitimate business reasons will not constitute improper motive or interference. *BPS Clinical Labs v Blue Cross & Blue Shield* (On Remand), 217 Mich App 687, 698-99; 552 NW2d 919 (1996); *Michigan Podiatric Medical Ass'n v Nat'l Foot Care Program, Inc*, 175 Mich App 723, 736; 438 NW2d 349 (1989).

In my judgment, plaintiff's original and first amended complaints did not sufficiently allege acts by defendants that constituted tortious interference with a business relationship. Nor was this defect cured by the proposed second amended complaint. An amended complaint is futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face, *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990); and the addition of allegations which merely restate those already made is also futile. *Dukesherer Farms, Inc v Director of the Dep't of Agriculture*, 172 Mich App 524, 530; 432 NW2d 721 (1988).

Plaintiff's proposed second amended complaint makes the following allegations, in pertinent part:

> 13. In approximately September of 1995, Defendant Quadrant, Inc. and three of its officers and shareholders conspired to drive Plaintiff out of business and appropriate Plaintiff's current and future customers and its current and future profits for itself by maliciously and illegally pirating away Plaintiff's veteran workforce.
>
> 14. Defendant Quadrant, Inc. contemplated, deliberated, and then committed malicious, intentional, and illegal acts that had as their sole objective to strip Plaintiff of its primary crews members, render it incapable of competing with Defendant thereafter, and insure that it would divert plaintiff's existing and future customers and contracts away from Plaintiff and to Defendants.

15. Defendant Quadrant, Inc.'s malicious, intentional, and illegal acts were intended to destroy Plaintiff's operations.

16. Defendant Quadrant, Inc. concealed its malicious, intentional, and illegal acts by committing them at the above reference Alvan Terminal project jobsite.

20. In September and October of 1995, Quadrant, Inc. and its officers and shareholders William Clark, Fadi Fawaz, and Joseph Peters, carried out their conspiratorial, malicious and illegal acts by having its supervisor of the Alvan Terminal project solicit and entice Plaintiff's employees Michael Rosier and Andreas Thiele, on the Alvan Terminal jobsite, into quitting Plaintiff's employ and accepting immediate employment with Defendant Quadrant, Inc.

These allegations are representative of those throughout the proposed second amended complaint. None of these allegations set forth specific affirmative acts by defendants that would indicate malice or improper motive. Rather, they are merely conclusory in their suggestion that defendants acted in a "malicious" or "illegal" manner.

In support of the proposition that malice can be alleged in such a conclusory manner, plaintiff relies on this Court's holding in *Grostick v Ellsworth*, 158 Mich App 18, 23; 404 NW2d 685 (1987). However, this view was later repudiated in the context of a defamation action in favor of the view that supporting facts must be given and that conclusory allegations of malice are insufficient. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 79-80; 480 NW2d 297 (1991). The Supreme Court affirmed this view in *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 274; 487 NW2d 205 (1992). The failure to identify affirmative acts in support of allegations of malice should result in summary disposition in favor of defendants pursuant to MCR 2.116(C)(8). *Id*. at 274; see also *Prysak v R L Polk Co*, 193 Mich App 1, 13-14; 483 NW2d 629 (1992). Malicious intent cannot be merely inferred from acts that are neither illegal, unethical, unjustified or fraudulent. *Feldman, supra* at 378; *Weitting, supra* at 198. Nor does mere knowledge of a business relationship by itself give rise to a cause of action for tortious interference. *BPS Clinical Labs, supra* at 698-99.

The essence of plaintiff's complaint is that defendants lured away key employees by offering higher wages. In the absence of improper or malicious behavior, there is nothing at all actionable in offering incentives or attractive benefits to prospective employees, even to those who may currently be employed by one's competitors. Offering wages "far in excess of the union pay scale or market rate" does not evidence either improper or malicious behavior.[1] 'At will' employers, in particular, perpetually face the prospect that their employees will be lured away by their competitors. Enticing away a competitor's 'at-will' employees is thoroughly appropriate business conduct in a free and competitive economy and should not be arbitrarily stifled in the guise of tortious interference.

Plaintiff's former employees had no contractual obligation here to plaintiff for any stated term. By plaintiff's own admission, they were 'at will' employees and free to leave at any time. Therefore,

based upon their employment contract, there was little reasonable expectation by plaintiff of future business advantage, sufficient to sustain the tort of interference. *Woody v Tamer*, 158 Mich App 764, 777 n 2; 405 NW2d 213 (1987); *Shipani v Ford Motor Co*, 102 Mich App 606, 622; 302 NW2d 307 (1981). A party's mere subjective expectation of the continuation of the contract cannot justify any greater expectation. *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 295; 475 NW2d 366 (1991).

Since plaintiff must show that defendants' actions were wrongful in some manner in order to state a claim for tortious interference, and since the proposed second amended complaint did not plead specific facts to corroborate plaintiff's allegation that defendants acted improperly or with malice, the court did not abuse its discretion in denying leave to file the second amended complaint. I would therefore affirm.

/s/ Stephen J. Markman

[1] Quite apart from the fact that "market rate" wages are determined by what, in fact, the market will pay employees, it is ironic that plaintiff argues simultaneously that his lured-away employees were paid in excess of the market rate by defendants, but that they also constituted a "very limited pool" of "highly trained" employees. Plaintiff's argument is reminiscent of what one often hears from the "small market" professional sports franchise when it has lost a free agent athlete. Where an investment in employee training has been made by an employer, such investment should be protected by a contract, not by the expectation of a future tortious interference lawsuit against one's competitors.